UTAMA WARDLEY BHD & ANOR.

v.

LENGGANG LAUT DVPT. SDN. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
SITI NORMA YAACOB J
[CIVIL SUIT NO. D2-23-1358-88]
26 SEPTEMBER 1990

COMPANY LAW: *Syndicated loan facility - Negative pledge of company's landed properties as securities - Whether financial assistance - Companies Act 1965, s. 67(1).*

CIVIL PROCEDURE: *Amendment of defence - Details of securities - Documents sufficiently identified in the defence - Redundant and unnecessary - Matter of evidence.*

By a sale and purchase agreement dated 19 May 1983, Asiatic Development Ltd., ADL, agreed to sell all its 16,793,260 shares in Paya Kamunting PK to the 1st defendant D1 for a consideration of RM16.8 million. D1 paid RM100,000 at the date of the agreement and the balance of the purchase price was to be settled under certain terms and conditions. Both payments were to be secured by irrevocable and unconditional bank guarantees.

The plaintiffs approved facilities to the defendants to finance the purchase in the form of a syndicated loan facility and bank guarantee.

The loan facility was secured *inter alia* by:

(1) a pledge of the entire PK shares;

(2) a joint and several guarantee of D1's shareholders; and

(3) a negative pledge of PK's landed properties the titles to such lands to be deposited with the plaintiffs.

These terms were accepted by D1 and a loan agreement dated 30 August 1983 was executed by the plaintiffs as lenders and D1 as borrower. In the loan agreement too, the term loan of RM11.7 million is described as a facility. A memorandum of deposit of shares also dated 30 August 1983 was also executed by D1 with the plaintiffs whereby D1 charged its title, right and interests in the entire PK shares to the plaintiffs.

The other security, a guarantee and indemnity was executed by the 2nd to 5th defendants guaranteeing the repayment of the loan. Subsequently, the plaintiffs released the loan of RM11.7 million to D1.

D1 defaulted in repayments and the plaintiffs sought to recover the sums due and owing to the plaintiffs in the proportion of their entitlements from D1 as principal borrower and the 2nd to 5th defendants as guarantors. Summary judgment was entered against the defendants.

The 2 matters pending before the Court were:

(1) a notice of appeal by the defendants dated 2 June 1989 to set aside the O. 14 judgment;

(2) an application dated 10 February 1990 filed by the defendants to amend their statement of defence to plead details of the securities provided by the defendants for the loan facilities started by the defendants, and also to adduce further and fresh evidence at the hearing of the appeal by the admission of an affidavit of the 4th defendant dated 9 June 1990.

The defendants contended that the negative pledge of PK's properties was a form of financial assistance to enable PK's shares to be purchased; therefore the loan transaction on which the plaintiff's cause of action is founded was illegal as being contrary to s. 67 of the Companies Act 1965.

Held:

[1] It is clear that whatever securities that were given in connection with the loan facilities are all contained in the plaintiffs' letter of offer dated 22 August 1983, the loan agreement dated 30 August 1983, and the guarantee and indemnity also dated 30 August 1983. As all these documents have been sufficiently identified in the original statement of defence, the amendments sought for by the defendants are redundant and unnecessary as the manner of the illegal transaction which the proposed amendments seek to introduce in the statement of defence is a matter of evidence which need not be pleaded in a statement of defence. In any event, the original statement of defence has already pleaded s. 67(1) for which the defendants rely to hold the loan transaction a nullity and this plea is sufficient to warn the plaintiffs that evidence of how that illegal transaction had taken place by the creation of a security which directly or indirectly amounts to a company rendering financial assistance in connection of a purchase of its shares, will be adduced by the defendants.

[2] The written undertaking given by PK is one of the conditions precedent under Clause 4.2 of the loan agreement and which forms part of the 1st plaintiff's obligations under the same agreement. As such it cannot be the real security for the loan and this is confirmed by Clause 12 of the loan agreement which when read together with Clause 4.2.9 identifies the security to be the mortgage of the security shares to the plaintiffs. Security shares is defined in Clause 1.1.31 to mean the PK shares.

[3] As the purpose of the loan as spelt out under Clause 3.1 is to make payment for the PK shares pursuant to the sale and purchase agreement dated 19 May 1981, executed by the 1st defendant with Asiatic, the undertaking given by PK can only mean that the value of the shares purchased shall not be unduly burdened or made worthless by PK's liabilities and for that purpose, the plaintiffs were only prepared to allow PK to incur liabilities not exceeding RM1 million at any one time for so long as D1's indebtedness to the plaintiffs remain outstanding.

[4] The deposit of PK's titles with the plaintiffs under Clause 10.1.6 of the loan agreement cannot be the real security for the loan as it is only one of the covenants which D1 is obliged to observe under Clause 10. The titles are only deposited and not charged to the plaintiffs. Thus in the event of D1's default of its obligations under the loan agreement, the plaintiffs cannot proceed to sell any of the titles as the plaintiffs are not chargee of the lands. They do not hold any registrable interests over the titles in question. It is because of this that the deposit of the titles has been described as a negative pledge in the plaintiffs' letter of offer to establish that the deposit of the titles had the effect of giving the plaintiffs a registrable interest.

[5] The titles of PK were only deposited with the plaintiffs and PK can request, for good reason, a release of any of its titles and the plaintiffs cannot unreasonably withhold releasing the title.

[6] For there to be a contravention under s. 67(1) of the Companies Act 1965, the defendants must establish that the contravention took place in 1983 when the loan of RM11.7 million was granted to D1. This release, RM3 million had been paid to the plaintiffs' account but I do not consider this is a contravention of s. 67(1) as the transaction took place in 1986.

Cases referred to:

Cheah Theam Swee & Anor. v. Overseas Union Bank Ltd. & Ors. [1989] 1 CLJ (Rep) 386 ***(cit)***

Yap Sing Hock Holdings Bhd. & Ors. v. Chuah Teong Hooi & Ors. [1989] 2 MLJ 503; [1989] 2 CLJ (Rep) 683 ***(cit)***

Chung Khiaw Bank Ltd. v. Hotel Rasa Sayang Sdn. Bhd. & Anor. [1990] 1 CLJ (Rep) 57 ***(cit)***

Legislation referred to:

Companies Act 1965, s. 67(1)

For the defendants/appellants - M. Segaram; M/s. M. Segaram
For the plaintiffs/respondents - Juliana Solomon; M/s. Rashid & Lee

JUDGMENT

Siti Norma Yaakob J:

There were 2 matters pending before me on 13 June 1990, and taking them in point of time, one was a notice of appeal dated 2 June 1989 filed by the defendants to set aside an O. 14 judgment entered on 2 June 1989 and the other was an application dated 10 February 1990, also filed by the defendants to amend their statement of defence and also to adduce further and fresh evidence at the hearing of the appeal by the admission of an affidavit of the 4th defendant dated 9 June 1990.

It is clear from the pleadings that the application to amend the statement of defence was only filed after judgment under O. 14 had been entered against the defendants. This however does not affect the defendants' application as the right to amend any pleading under O. 20 can be done at any stage of the proceedings provided no injustice is done to the other parties in the proceedings. When dealing with such an application, the Court has a discretion to allow leave to amend but like any other discretion, it must be exercised judicially.

The proposed amendments sought by the defendants were nothing more than to plead details of the securities provided by the defendants for the loan facilities granted by the plaintiffs. One of such securities is the negative pledge of the landed properties belonging to a company called Paya Kamunting Development Sdn. Bhd. (Paya Kamunting), the very same company whose shares were being purchased by the 1st defendant from the loan facilities granted by the plaintiffs. As the defendants consider that the negative pledge of Paya Kamunting properties was a form of financial assistance to enable the Paya Kamunting shares to be purchased, it is the defendants' contention that the loan transaction on which the plaintiffs' cause of action is founded is illegal as being contrary to s. 67(1) of the Companies Act 1965.

Looking at the defendants' original statement of defence, dated 19 August 1988, s. 67(1) has already been specifically pleaded at para. 10 but the form of financial assistance mentioned as having been given by Paya Kamunting was the pledging of the very same shares to be purchased by the 1st defendant. However, para. 13 of the original statement of defence goes further to specify that in addition to the pledging of its shares, Paya Kamunting had also pledged its "other assets" with the plaintiffs and I consider that the words "other assets" are wide enough to include the pledging of Paya Kamunting's landed properties as well, if indeed there had been such a pledge.

From the pleadings, it is clear that whatever securities that were given in connection with the loan facilities are all contained in the plaintiffs' letter of offer dated 22 August 1983, the loan agreement dated 30 August 1983, and the guarantee and indemnity also dated 30 August 1983. As all these documents have been sufficiently identified in the original statement of defence, I consider that the amendments sought for by the defendants are

redundant and unnecessary as the manner of the illegal transaction which the proposed amendments seek to introduce in the statement of defence is a matter of evidence which need not be pleaded in a statement of defence. In any event, the original statement of defence has already pleaded s. 67(1) for which the defendants rely to hold the loan transaction a nullity and this plea, I consider, is sufficient to warn the plaintiffs that evidence of how that illegal transaction had taken place by the creation of a security which directly or indirectly amounts to a company rendering financial assistance in connection of a purchase of its shares, will be adduced by the defendants. Since the purpose of amending a pleading is to state clearly what the issues are so that the other party will not be taken by surprise and since the defendants' original statement of defence has clearly identified the issues, I had considered that the defendants' proposed amendments quite unnecessary and redundant. On that finding, I had accordingly dismissed the defendants' application with costs.

Turning to the 4th defendant's affidavit dated 9 February 1990, which the defendants seek to use in the subsequent hearing of the appeal against the O. 14 judgment, I find that there is nothing new affirmed in the affidavit that has not already been alluded to in the 4th defendant's earlier affidavit dated 18 November 1988 and which had been relied upon by the defendants to dispute their liability in the summary proceedings before the Senior Assistant Registrar. The deposit of Paya Kamunting titles with the plaintiffs is already confirmed by the documentary evidence attached to the 4th defendant's earlier affidavit and as far as I can see, the 4th defendant's affidavit dated 9 February 1980 introduces no fresh evidence which is already apparent in the pleadings and in the documentary exhibits. On that basis, I had also ruled that prayer 2 of the defendants' application to adduce fresh evidence is unnecessary and redundant and I had accordingly disallowed it with costs.

Coming now to the merits of the appeal, it is necessary that I firstly outline the background of the parties business transaction with each other so that the issues can be clearly identified and determined.

Following a sale and purchase agreement dated 19 May 1983, Asiatic Development Limited (Asiatic) agreed to sell all its 16,793,260 shares in Paya Kamunting to the 1st defendant for a consideration of RM16.8 million. The 1st defendant paid RM100,000 at the date of the agreement and the balance of the purchase price was to be settled by the 1st defendant in the following manner:

(1) RM5.4 million to be paid within 60 days of FIC's approval for the purchase, such payment to be secured by an irrevocable and unconditional bank guarantee and

(2) the remaining RM11.3 million to be paid within 365 days of FIC's approval for the purchase, payment for which was also to be secured by another irrevocable and unconditional bank guarantee for that amount.

To finance the purchase, the 1st defendant turned to the plaintiffs and in the plaintiffs' letter of offer dated 22 August 1983, the following facilities were approved to the defendants:

(1) A guarantee facility of RM16.7 million for 1 year from 22 August 1983. This bank guarantee is to fulfill the requirements of the 2 guarantees as I have stated in (1) and (2) above.

(2) A loan facility of RM11.7 million for 2 years from 20 September 1983.

As the facilities provided were syndicated facilities, the 1st plaintiff was to provide RM5 million towards the guarantee and RM3.7 million towards the loan with the 2nd plaintiff

providing the remaining RM11.7 million towards the guarantee and RM8 million towards the loan. So it is clear from the letter of offer itself that the plaintiffs provided 2 forms of facilities, a bank guarantee for RM16.7 million and a loan facility for RM11.7 million.

Putting aside the bank guarantee, I shall now deal directly with the loan facility, as the plaintiffs' cause of action is founded on the loan facility. Under the terms of the plaintiffs' letter of offer, the initial drawdown of RM5.4 million was to be made on or before 20 September 1983 and the balance of RM6.3 million on or before 21 July 1984. Repayment by the 1st defendant was to be in 5 quarterly instalments of RM2.340 million each, the first commencing on 20 September 1984, and thereafter on 20 December 1984, 20 March 1985, 20 June 1985, and 20 September 1985. The loan shall be fully repaid 24 months after the date of the initial drawdown, that is, on or before 20 September 1985.

The loan facility was secured *inter alia* by:

(1) a pledge of the entire Paya Kamunting shares.

(2) a joint and several guarantee of the 1st defendant's shareholders.

(3) a negative pledge of Paya Kamunting's landed properties and for this purpose the titles to such lands shall be deposited with the plaintiffs.

(4) Paya Kamunting's total actual and contingent liabilities shall not exceed RM1 million at any one time and

(5) all proceeds of sale of any of Paya Kamunting's lands shall be deposited with the plaintiffs.

These terms were accepted by the 1st defendant and a loan agreement dated 30 August 1983 was executed by the plaintiffs as lenders and the 1st defendant as borrower. In the loan agreement too, the term loan of RM11.7 million is described as 'a facility'. A memorandum of deposit of shares also dated 30 August 1983 was also executed by the 1st defendant with the plaintiffs whereby the 1st defendant charged its title, right and interests in the 16,793,260 Paya Kamunting shares to the plaintiffs. The other security, a guarantee and indemnity also dated 30 August 1983 was executed by the 2nd to 5th defendants guaranteeing the repayment of the loan.

Pursuant to the 1st defendant's written requests made on 16 September 1983 and 20 July 1984, the plaintiff released the full extent of the loan by 2 drawdowns of RM5.4 million and RM6.3 million respectively. The first repayment instalment of RM2.34 million was to have been made by the 1st defendant on 20 September 1984 but following the 1st defendant's request for a deferment of repayment on the first 2 instalments, the plaintiffs agreed to defer repayment of the first 2 instalments to 20 March 1985 together with the 3rd instalment with the last 2 instalments to remain on the dates earlier agreed provided that the 1st defendant pay all overdue interest together with penalty interest in full. The 1st defendant however defaulted in its obligation to make such repayments and hence the instant action to recover sums due and owing to the plaintiffs in the proportion of their entitlements from the 1st defendant as principal borrower and the 2nd - 5th defendants as guarantors.

As the only issue raised in the appeal is whether the loan transaction is caught by s. 67(1) of the Companies Act 1965, the first question to be asked is what were the actual securities that were provided for the loan? The defendants claim that since Paya Kamunting had given an undertaking to the plaintiffs under Clause 4.2.3 of the loan agreement, that its total actual and contingent liabilities shall not at any one time exceed RM1 million and that the titles of

its landed properties identified in Clause 1.1.27 of the loan agreement have been deposited with the plaintiffs under Clause 10.1.6 of the loan agreement, Paya Kamunting has provided financial assistance to the defendant's in connection with the purchase of its shares and the loan transaction is therefore void under s. 67(1) of the Companies Act 1965.

The written undertaking given by Paya Kamunting is one of the conditions precedent under Clause 4.2 of the loan agreement and which forms part of the 1st defendant's obligations under the same agreement. As such it cannot be the real security for the loan and this is confirmed by Clause 12 of the loan agreement which when read together with Clause 4.2.9 identifies the security to be the mortgage of the security shares to the plaintiffs. Security shares is defined in Clause 1.1.31 to mean the Paya Kamunting shares.

As the purpose of the loan as spelt out under Clause 3.1 is to make payment for the Paya Kamunting shares pursuant to the sale and purchase agreement dated 19 May 1981, executed by the 1st defendant with Asiatic, the undertaking given by Paya Kamunting can only mean that the value of the shares purchased shall not be unduly burdened or made worthless by Paya Kamunting's liabilities and for that purpose, the plaintiffs were only prepared to allow Paya Kamunting to incur liabilities not exceeding RM1 million at any one time for so long as the 1st defendant's indebtedness to the plaintiffs remain outstanding.

For that matter, the deposit of Paya Kamunting's titles with the plaintiffs under Clause 10.1.6 of the loan agreement cannot be the real security for the loan as it is only one of the covenants which the 1st defendant is obliged to observe under Clause 10. The titles are only deposited and not charged to the plaintiffs. Thus in the event of the 1st defendant's default of its obligations under the loan agreement, the plaintiffs cannot proceed to sell any of the titles as the plaintiffs are not chargees of the lands. They do not hold any registrable interests over the titles in question. It is because of this that the deposit of the titles has been described as a negative pledge in the plaintiffs' letter of offer.

The defendants however attempted to establish that the deposit of the titles had the effect of giving the plaintiffs a registrable interest and for this relied on a number of authorities where the facts show that titles were in fact charged by the borrower to the lenders as was the case in *Cheah Theam Swee & Anor. v. Overseas Union Bank Ltd. & Ors.* [1989] 1 CLJ (Rep) 386 and in *Yap Sing Hock Holdings Bhd. & Ors v. Chuah Teong Hooi & Ors.* [1989] 2 CLJ (Rep) 683, the securities were provided by a third party and not by the company, whose shares were being purchased. Again in *Chung Khiaw Bank Ltd. v. Hotel Rasa Sayang Sdn. Bhd. & Anor.* [1990] 1 CLJ (Rep) 57, the contravention is clear as the security was given by the hotel whose shares were being purchased.

In this case as the titles were only deposited with the plaintiffs, Paya Kamunting can, for good reason, request for the release of any of its titles and the plaintiffs cannot unreasonably withhold releasing the title and in fact such a request was made in March 1986 to enable Paya Kamunting to provide the title as a security for a loan of RM10 million granted by the Co-operative Central Bank to the 4th defendant. For this release, RM3 million had been paid to the plaintiffs' account but I do not consider this is a contravention of s. 67(1) as the transaction took place in 1986. For there to be any contravention, the defendants must establish that the contravention took place in 1983 when the loan RM11.7 million was granted to the 1st defendant.

On the facts of this case, since the deposit of the Paya Kamunting's title does not, I consider,

contravene s. 67(1) of the Companies Act 1965, I had accordingly dismissed the defendant's appeal with costs.

Also found at [1991] 3 CLJ 2233